

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
ERWIN R. BURWELL,

Plaintiff,

-against-

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.
-----X

:

REPORT & RECOMMENDATION

:

12 Civ. 2462 (PAC) (MHD)

:

:

:

TO THE HONORABLE PAUL A. CROTTY, U.S.D.J.:

1/18/13

Erwin R. Burwell, a physician and pro se plaintiff, filed this lawsuit under 42 U.S.C. § 405(g) to challenge the denial by the Social Security Administration ("SSA") of his application for disability insurance benefits. He claimed to have become disabled principally as a result of suffering from the human immunodeficiency virus ("HIV"), as well as the side effects of medications that he has been taking for this condition.

Defendant filed an answer to the complaint, with an accompanying transcript of the administrative proceedings. He has since moved for an order remanding this case to the SSA for further consideration because the Administrative Law Judge who decided Burwell's administrative application failed to adequately address

whether plaintiff's condition met or equaled any impairment listed in Appendix 1 of 20 C.F.R. 404(P). (Def.'s Mem. of Law 2). The plaintiff has not responded to the motion, despite having been given the opportunity to do so. (Endorsed Order dated Dec. 6, 2012).

The specific inquiry to which defendant points concerns whether plaintiff's condition qualifies as a per se disability under Listing Section 14.08F. Pursuant to that provision, an applicant is deemed per se disabled if the applicant suffers from HIV and a condition of the skin or mucous membrane that is not otherwise listed in Section 14.08 and that features extensive fungating or ulcerating lesions which are not responsive to treatment. As defendant points out, plaintiff has HIV, and although his genital warts seem to have been treatable for a period of time (Tr. 166, 183-85, 188, 193), a November 14, 2011 report (which post-dates the ALJ's decision) recited that plaintiff was under monthly and painful treatment for condyloma (Tr. 210), and a report one week later stated that plaintiff was suffering from chronic and persistent HPV infection of the anus. (Tr. 214).

The ALJ's finding that plaintiff did not have a chronic viral infection is contradicted by the later report of persistent HPV

infection. The ALJ did not reach the question of whether plaintiff's viral infection resulted in "extensive fungating or ulcerating" lesions, in assessing plaintiff's disability under § 14.08F.

Although the ALJ, on a fuller record, could conceivably find that plaintiff is disabled, some of the most pertinent data is found in records post-dating the ALJ's decision. Under the circumstances, it is appropriate to remand the case for further findings by the ALJ. See Parker v. Harris, 626 F.2d 225, 235 (2d Cir. 1980) (remand is appropriate when there are gaps in the administrative record); Cutler v. Weinberger, 516 F.2d 1282, 1287 (2d Cir. 1975).

CONCLUSION

For the reasons stated, we recommend that defendant's unopposed motion to remand this case for further consideration by the SSA be granted.

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report

and Recommendation. Such objections shall be filed with the Clerk of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable Paul Crotty, Room 735, and to the chambers of the undersigned, Room 1670, 500 Pearl Street, New York, New York, 10007. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See Thomas v. Arn, 474 U.S. 140, 150 (1985); Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(d).

DATED: New York, New York
January 18, 2013

RESPECTFULLY SUBMITTED,



MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Order and Report & Recommendation have been mailed this date to:

Mr. Edwin Ramon Burwell
P.O. Box 157
Henderson, North Carolina 27538

Leslie A. Ramirez-Fisher, Esq.
Assistant United States Attorney
for the Southern District of New York
86 Chambers Street
3d Floor
New York, New York 10007